RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
FILED
OCT 30 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
and JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, and DAVID MULLINS,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRO DE ESTUDIOS LEGALES Y SOCIALES, DEJUSTICIA, EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS, HUMAN RIGHTS LAW NETWORK, HUNGARIAN CIVIL LIBERTIES UNION, IRISH COUNCIL FOR CIVIL LIBERTIES, KENYA HUMAN RIGHTS COMMISSION, LEGAL RESOURCES CENTRE, AND NATIONAL COUNCIL FOR CIVIL LIBERTIES IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are all members of the International Network of Civil Liberties Organizations ("INCLO"), a network of thirteen independent, national human rights organizations from different countries that work together to promote fundamental rights and freedoms, including those of lesbian, gay, bisexual, and transgender ("LGBT") individuals. This *amici curiae* brief offers an international perspective on discrimination against individuals who are denied services because of their sexual orientation and the profound harm this discrimination inflicts, and specifically, how judiciaries in other countries have articulated this harm. The careful reasoning of courts in other countries confronting analogous cases regarding the same fundamental human rights issues at stake here deserves consideration by this Court.

The **Canadian Civil Liberties Association ("CCLA")** is a national organization established in 1964 to protect and promote respect for and observance of fundamental human rights and civil liberties. CCLA's advocacy for the rights of LGBT individuals has included protecting LGBT individuals from discrimination, advocacy for same-sex marriage in Canada,

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[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that counsel of record for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* also certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

advocating for and educating about the rights of LGBT youth in schools, and making submissions in the Canadian Parliament regarding the equality rights of transgender people.

Since its founding in 1979, during a military dictatorship, the **Centro de Estudios Legales y Sociales ("CELS")** has fought against systematic human rights violations in Argentina. With the return of democracy in 1983, CELS began to work toward consolidating the State's role in the protection of human rights, promoting an increased exercise of these rights by the most vulnerable sectors of society, and influencing the design and implementation of public policies. CELS calls attention to human rights standards, including the prevention of discrimination against LGBT persons.

Founded in 2005, **Dejusticia** is a Colombia-based research and advocacy organization dedicated to strengthening the rule of law and promoting social justice and human rights in Colombia and the Global South. Dejusticia seeks to empower vulnerable and marginalized communities, such as the LGBT community, and to promote positive social change by producing rigorous studies and fact-based policy proposals; carrying out effective advocacy campaigns; litigating in the most impactful forums; and designing and delivering educational and capacity-building programs.

The **Egyptian Initiative for Personal Rights ("EIPR")** is a non-governmental organization ("NGO") dedicated to supporting personal rights. It has worked

since 2002 on strengthening and protecting basic rights and freedoms in Egypt, including those of LGBT persons, through research, advocacy, and litigation in the fields of civil liberties, economic and social justice, democracy and political rights, and criminal justice.

Founded in India in 1989, the **Human Rights Law Network ("HRLN")** is a collective of lawyers and social activists dedicated to the use of the legal system to advance human rights and ensure access to justice for all in India and the sub-continent, including LGBT persons. HRLN collaborates with other human rights groups as well as grass-roots development and social movements to protect the rights of poor and marginalized people and to challenge oppression and discrimination against any group or individual on the grounds of caste, gender, disability, age, religion, language, ethnic group, sexual orientation, and health, economic, or social status.

The **Hungarian Civil Liberties Union ("HCLU")** is an independent non-profit human rights NGO established in Budapest, Hungary in 1994. HCLU promotes fundamental rights and principles set forth in the Constitution of the Republic of Hungary and international conventions. HCLU's goal is to build and strengthen civil society and the rule of law in Hungary and the Central Eastern European region. HCLU is guided by its commitment to nondiscrimination, including the principle that LGBT individuals should enjoy the same basic rights and protections and access to public and governmental services as all other citizens.

The **Irish Council for Civil Liberties ("ICCL")** is Ireland's leading independent human rights NGO. ICCL monitors, educates, and campaigns to secure full enjoyment of human rights for everyone, including LGBT persons. Founded in 1976 by Mary Robinson and others, ICCL has played a leading role in some of Ireland's most successful human rights campaigns. These have included campaigns to decriminalize homosexuality, legalize same-sex marriage, establish an independent Garda Ombudsman Commission, secure more effective protection of children's rights, and introduce enhanced equality legislation. Since 1976, ICCL has lobbied the Irish government to ensure the full implementation of international human rights standards in Ireland.

The **Kenya Human Rights Commission ("KHRC")** is an NGO founded in 1991 with the aim of defending human rights and advocating for political reforms in Kenya. KHRC's mission is to work towards the respect, protection, and promotion of all human rights for all individuals and groups, including members of the LGBT community. KHRC works to entrench human rights and democratic values by facilitating and supporting individuals, communities, and groups to claim and defend their rights by holding state and non-state actors accountable for their actions.

Based in South Africa, **Legal Resources Centre ("LRC")** seeks to use the law as an instrument of justice for the vulnerable and marginalized, including LGBT people and communities, who suffer discrimination. Inspired by South Africa's history, its constitution,

and international human rights standards, LRC is committed to a fully democratic society based on the principle of substantive equality. LRC works to address the significant stigma, prejudice, and ignorance concerning LGBT issues, particularly with regard to hate crimes. LRC also works to protect asylum seekers who flee from the threat of imprisonment and the death penalty as a result of their sexual orientation and gender identity.

The **National Council for Civil Liberties ("Liberty")** is one of the United Kingdom's leading civil liberties and human rights organizations. Liberty promotes human rights and civil liberties by bringing test-case litigation, lobbying, campaigning, and conducting research. Founded in 1934, Liberty has campaigned and litigated against LGBT discrimination in the United Kingdom for decades, and it lobbied extensively in support of the Marriage (Same Sex Couples) Act 2013.

SUMMARY OF ARGUMENT

Time and again, from *Brown v. Board of Education*, to *Roberts v. Jaycees*, to *Obergefell v. Hodges*, this Court has rejected discrimination based on race, sex, religion, ethnicity, or sexual orientation.[2] The Court based these and other landmark decisions, in great

[2] *Brown v. Board of Education*, 347 U.S. 483, 495 (1954); *Roberts v. Jaycees*, 468 U.S. 609, 625, 629 (1984); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

part, on the significant dignitary harm and social stigma that individuals suffer when they experience such discrimination. Indeed, the harm is more than the "dollars and cents, hamburgers and movies" denied when individuals are refused service because of who they are, "it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (citation omitted). It is an "assertion of . . . inferiority" that "denigrates the dignity of the excluded" and "reinvokes a history of exclusion." *JEB v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994). Quite simply, this harm strikes at the core of basic human dignity. Obtaining similar service or even the same service elsewhere offers no solace, as it is the very act of being turned away based on one's identity that causes incurable and intolerable damage.

The United States is not alone in recognizing the harm of discrimination and exclusion. Many countries around the world have also acknowledged this harm. And in recent decades, courts in the United States and abroad have begun to more consistently recognize the harms suffered by the LGBT community when either governments or private businesses discriminate against this historically marginalized group. Courts have looked to the long and significant discrimination society has inflicted on LGBT persons—from harassment and assault to imprisonment and even death. To remedy this harm, courts and legislatures from South Africa to Colombia, the United Kingdom to Israel have

expanded non-discrimination laws to include sexual orientation.

Numerous countries around the globe have addressed issues similar to those presented in this case, and have engaged in similar debates and arguments surrounding religious liberties and principles of equality. After considering the competing interests and harms, many courts and tribunals have required businesses and government officials to ensure equal protection for LGBT individuals. Indeed, courts on five continents have enforced laws to protect LGBT people who are refused services because of their sexual orientation, recognizing that such discrimination unacceptably relegates them to second-class citizenship. Turning away LGBT persons not only denigrates their dignity, but causes the exact harm that antidiscrimination laws promise to abolish.

This Court has examined international decisions in a number of cases involving basic human rights. *See Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *Graham v. Florida*, 560 U.S. 48, 80-82 (2010). While not dispositive, the decisions of the international community provide helpful insight into issues affecting communities across our ever-shrinking world, insights that can inform this Court's consideration of this case.

ARGUMENT

I. Courts and Tribunals Around the World Have Recognized the Severe Harm Inflicted on LGBT Individuals When They Are Denied Services Available to the Public.

A. Private Actors

In numerous jurisdictions, businesses and other commercial institutions open to the public must follow laws that bar discrimination, including against LGBT people seeking to access those services. Some businesses that serve the public in these jurisdictions, however, have asserted a right to turn away LGBT customers or deny them certain services. Courts and tribunals in the United Kingdom, Israel, Canada, and Colombia, among others, have rejected these claims, regardless of the availability of alternative accommodations or the motive behind such discrimination. They have weighed considerable competing interests, including genuine religious views, and concluded that in these situations the deep insult to human self-worth inflicted on individuals who are refused services because of their identity outweighs other interests.

United Kingdom. The United Kingdom recognizes that businesses that refuse service to LGBT individuals in violation of existing laws perpetuate historic prejudice against the LGBT community and inflict significant dignitary harm.[3] In *Bull v. Hall*, a

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[3] As a corollary, the United Kingdom's judiciary has found, and the European Court of Human Rights confirmed, that firing a counselor who refused to treat same-sex couples on religious

hotel denied a same-sex couple their reservation because of the hotelkeepers' religious beliefs. [2013] UKSC 73, [10] (Eng.). The Supreme Court of the United Kingdom found such discrimination violated the law. *Id.* at 55. In doing so, the court recognized that the historical denial of the right to marry "was an affront to [same sex couples'] dignity as human beings." *Id.* at 53. Thus, "[n]ow that, at long last, same sex couples can enter into mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way."[4] *Id.* at 36. And in this case, the right of the same-sex couple "to not be unlawfully discriminated against" outweighed the infringement on the hotelkeepers' right to manifest their beliefs. *Id.* at 44.

Israel. An Israeli court also endorsed the view that offering services to the public means opening doors to all. In *Tal Ya'akovovich and Yael Biran v. Yad Hashmona Guest House and Event Hall*, a lesbian couple looked for a venue to host their wedding party—but was refused by an observant Orthodox Jewish guest house. CS 5901/09 *Tal Ya'akovovich and Yael Biran v. Yad Hashmona Guest House and Event Hall*,

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grounds did not constitute discrimination based on the employee's religion. *McFarlane v. Relate Avon Ltd.*, 2010 WL 3256201 (2010) (Eng.); *Eweida v. United Kingdom*, 37 Eur. Ct. H.R., 110 (2013).

[4] The court also noted that "centuries of discrimination, persecution even" suffered by LGBT individuals should make society "slow to accept that prohibiting hotelkeepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion." *Bull v. Hall*, [2013] UKSC 73, [53] (Eng.).

(2012) (Isr.) 2. The court found the couple had suffered unlawful discrimination:

> As for the claim of the [guest house] that if it were obliged by the court to host events "of this type" then it would be forced to close the guest house, my answer is simple: *every person who opens a public business in Israel must be aware that they must serve the entire public equally, without discrimination, for all the reasons enumerated by law, which cover sexual orientation as well.* As soon as the [guest house] opened their doors to all, they cannot close them to those whom they believe do not meet their interpretations of the requirements found in the Old and New Testaments, while offending their dignity and sensitivities.

Id. at 8 (emphasis added). The court emphasized the discrimination caused real and lasting damage to the couple, stating:

> It is clear to all that if it is said to a person that we do not hold events "of this type," this indicates some repulsion, offense, insult and debasement. *Just as we view discrimination on the basis of race as insulting and debasing, likewise should we also view discrimination on the basis of sexual orientation.*

Id. at 9 (emphasis added). Thus, "the dignity of the claimants was in fact offended due to their sexual orientation." *Id.* at 10.

Canada. A Canadian tribunal has similarly recognized the humiliation suffered when a same-sex couple is refused services that a business would otherwise provide to an opposite-sex couple, even when that refusal is motivated by sincere religious beliefs. In *Eadie v. Riverbend Bed & Breakfast*, a gay couple was denied a room at a bed and breakfast, due to the owners' religious beliefs. 2012 BCHRT 247, ¶¶ 48-59, 94 (Can.). The tribunal considered "the exercise of personal religious beliefs in the public sphere" against the "indignity and humiliation" suffered by the same-sex couple. *Id.* at ¶¶ 168-69; *see also id.* at ¶¶ 139, 165, 173. Having weighed those significant interests, the tribunal ultimately concluded that the business's actions were discriminatory. *Id.* at ¶ 173. In applying the antidiscrimination law, the tribunal explained that "[h]aving entered into the commercial sphere, the [bed and breakfast owners], like other business people, were required to comply with the laws . . . that prohibit[] discrimination on the basis of sexual orientation." *Id.* at ¶ 169.[5]

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[5] A Canadian appellate court has also acknowledged harm stemming from workplace mistreatment and discrimination based on sexual orientation. In *Ontario Human Rights Commission v. Christian Horizons*, a religious-affiliated social services organization commenced unjustified disciplinary action against an employee engaged in a same-sex relationship, and "offered counselling to restore her to a state of compliance with the [Lifestyle and Morality] statement," which prohibited homosexual relationships. 2010 ONSC 2105, ¶¶ 6, 8-9, 108, 112 (CanLII). The "humiliation, attacks and mistreatment" the employee endured warranted damages "for the wilful and reckless infliction of mental anguish." *See id.* at ¶¶ 19, 111-12, 115, 119.

Colombia. Colombian courts have emphasized the gross affront to human dignity caused when an individual, because of their sexual orientation, is excluded from a public business—a harm that affects not just the individual, but also the LGBT community at large. In a series of cases involving individuals being expelled from public spaces due to displays of affection, the Colombian courts found discrimination based on sexual orientation. Corte Constitutional [C.C.] [Constitutional Court] 1 de diciembre de 2011, Sentencia T-909/11, (¶ 111) (Colom.); Corte Constitutional [C.C.] [Constitutional Court] 2 de junio de 2016, Sentencia T-291/16, (¶ 58) (Colom.); Corte Constitutional [C.C.] [Constitutional Court] 24 de enero de 2017, Sentencia T-030/17, (¶ 67) (Colom.). One decision specifically pointed out that "when one considers acts against members belonging to historically-discriminated groups, . . . the act of criticism, although it affects the individual specifically, ultimately operates as more of a manifestation against the population, group or collective that is being discriminated." Corte Constitutional [C.C.] [Constitutional Court] 1 de diciembre de 2011, Sentencia T-909/11, (¶ 111) (Colom.). Further, another court explained that a "request to leave the commercial center made by a guard to the [LGBT individuals], because of the manifestations of affection they displayed among themselves, constituted a violation of the fundamental rights to human dignity, the free development of personality and the personal privacy of the [LGBT persons]." Corte Constitutional [C.C.] [Constitutional Court] 24 de enero de 2017, Sentencia T-030/17, (¶ 68(d)) (Colom.); *see also* Corte Constitutional

[C.C.] [Constitutional Court] 2 de junio de 2016, Sentencia T-291/16, (¶ 41(viii)) (Colom.).

South Africa. A South African court has also acknowledged the significant harm to individual self-worth caused by discrimination based on sexual orientation. In *Strydom v. Nederduitse*, a music teacher at a church was fired for being gay. 2009 (4) SA 510 (Equality Court) (S. Afr.). The court found the discrimination unlawful and improper, and acknowledged the music teacher's "right to dignity [was] seriously impaired due to the unfair discrimination." *Id.* at ¶ 25. In particular, "the fact of being discriminated against on the ground of his homosexual orientation had an enormous impact on the [teacher]'s right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination." *Id.* In fashioning a remedy for the teacher's "impairment of . . . dignity and emotional and psychological suffering," the court quoted a pivotal South African case regarding the right to same-sex marriage:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the Affirmation of self, not the denial of self. Equality therefore does

> not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.

Id. at ¶ 35 (quoting *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC), ¶ 60 (S. Afr.)). The teacher was awarded monetary damages "for the impairment of [his] dignity and emotional and psychological suffering," as well as an apology. *Id.* at ¶ 41.

B. Government Actors

Courts abroad have carefully considered many similar arguments in situations involving discrimination by government actors. In this context, too, courts have emphasized the grievous harm inflicted on individuals who suffer discrimination. The refusal by government actors to provide civil services to certain individuals not only undermines equal treatment under the law, but also serves to inflict the very harm the law was designed to prevent. The courts of various countries including Canada, France, and the United Kingdom have thus rejected exemptions for civil servants seeking a right to refuse same-sex marriage and civil partnership service, concluding that the harm wrought against LGBT individuals outweighs conflicting interests.

Canada. A Canadian appellate court rejected exemptions that would allow government employees with certain genuine beliefs to refuse to perform same-sex marriage ceremonies. In *In re Marriage Commissioners Appointed Under the Marriage Act*, the court concluded that an exception would unjustifiably "violate the equality rights of gay and lesbian individuals," even though mandating performance of same-sex marriage ceremonies substantially infringed on the religious freedom of marriage commissioners. 2011 SKCA 3, ¶¶ 2-3, 65 (CanLII). In doing so, the court highlighted the "genuinely harmful impacts" that would arise from sanctioning denial of services to gay and lesbian couples by civil marriage commissioners. *Id.* at ¶ 95. The court emphasized that the availability of another government actor who would conduct the ceremony did not matter:

> [T]his . . . overlooks, or inappropriately discounts, the importance of the impact on gay or lesbian couples being told by a marriage commissioner that he or she will not solemnize a same-sex union. . . . It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer "I won't help you because you are black (or Asian or First Nations) but someone else will" or "I won't help you because you are Jewish (or Muslim or Buddhist) but someone else will." Being told "I won't help you because you are gay/lesbian but someone else will" is no different.

Id. at ¶ 41. Acknowledging the historical mistreatment of same-sex couples, the court explained that allowing civil servants to refuse to provide marriage services "solely because of . . . sexual orientation would clearly be a retrograde step—a step that would perpetuate disadvantage and involve stereotypes about the worthiness of same-sex unions." *Id.* at ¶ 45. The court expressly quoted the reaction of an LGBT person who had been denied such services:

> It was actually pretty devastating. . . . I was just crushed about it. I couldn't believe that as a human being I wasn't going to be treated as a real person. And everybody should be treated as a real person.

Id. at ¶ 95 (citation omitted). The court also recognized the broad and harmful impact on society at large:

> Negative effects of this sort would not be restricted to those gay and lesbian individuals who are directly denied marriage services. A more generalized version of it would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole. *Simply put, it is not just gay and lesbian couples themselves who would be hurt or offended by the notion that a governmental official can deny services to same-sex couples. Many members of the public would also be negatively affected by the idea.*

Id. at ¶ 96 (emphasis added).

France. France also denied exemptions for civil servants refusing to officiate same-sex marriages based on religious beliefs, highlighting the legislature's interest in the neutrality of public services. In *Franck M.*, the court's emphasis on the "neutrality of the civil service" underscores how civil servants using their personal beliefs to engage in public discrimination undermines the principle of equal treatment under the law. *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-353 QPC, Oct. 18, 2013, ¶¶ 10-11 (Fr.).

United Kingdom. The United Kingdom too recognizes the harm caused by civil servants refusing to register civil partnerships for LGBT persons, and has upheld firing an employee who refuses for religious reasons. In *Ladele v. London Borough of Islington*, a government employee would not register civil partnerships for same-sex couples due to her religion, and was consequently let go. [2009] EWCA (Civ) 1357, [15] (Eng.). The court upheld this result. *Id.* at 76-78. The civil servant's refusal ran afoul of the government's promise of equal treatment under the law. *See id.* at 52 ("[Her] refusal to perform [civil partnerships for same-sex couples] involved discriminating against gay people. . . . [S]he was being asked to perform the task because of [the government]'s Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among [the government]'s employees, and as between [the government] (and its employees) and those in the community they served.").

Judiciaries in various countries have confronted discrimination against individuals who are denied services because of their sexual orientation. In doing so, many courts have recognized the lasting dignitary harm this discrimination inflicts, and concluded that such harm outweighs considerable conflicting interests.

CONCLUSION

Profound harm results when LGBT individuals are denied services offered to the public. It does not matter whether there is another hotel, bed and breakfast, reception hall, mall, workplace, civil servant, or bakery available. It does not matter whether the denial is motivated by sincere religious belief or personal convictions. The discriminatory denial of services itself "deprives persons of their individual dignity," *Roberts v. Jaycees*, 468 U.S. 609, 625 (1984), and "may affect their hearts and minds in a way unlikely ever to be undone," *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Courts and tribunals from many countries have recognized that such harm is significant and outweighs even substantial competing rights and interests. Exemptions to antidiscrimination laws of the sort called for in the case at hand would permit any entity offering services to the public to relegate LGBT individuals to second-class status, causing the severe dignitary harm that equality laws were enacted to prevent.

For all of the foregoing reasons, and for those presented by Respondents, the Colorado Court of Appeals' decision should be affirmed.

Respectfully submitted,

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Dated: October 30, 2017